Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JOSEPH TRENT MOSBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHERE THE DISTRICT COURT ENHANCED PETITIONER'S SENTENCE ON THE BASIS OF DRUG QUANTITY PROVEN ONLY BY A PREPONDERANCE OF THE EVIDENCE AND NOT BY A REASONABLE DOUBT, NOR ON THE BASIS OF WHAT WAS REASONABLY FORSEEABLE, DOES APPRENDI V. NEW JERSEY REQUIRE THAT HIS SENTENCE BE VACATED?

WHERE THE TRIAL COURT WAS AWARE OF THREAT UPON ITS LIFE SUGGESTED BY PETITIONER, AND WHERE PETITIONER RECEIVED THE HIGHEST SENTENCE OF THE SIXTEEN DEFENDANTS SENTENCED, DOES BRACY V. GRAMLEY AUTHORIZE HABEAS DISCOVERY BE AFFORDED IN ORDER THAT PETITIONER MAY PROVE HIS CLAIM OF JUDICIAL BIAS?

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The Petitioner, Joseph Trent Mosby, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING BELOW

Joseph Trent Mosby

United States of America

OPINION BELOW

The Order of the Court of Appeals denying Mr. Mosby his request for habeas review is unpublished and attached, as is the district court opinion. The Eighth Circuit decision on direct review is United States v. Mosby, 177 F.3d 1067 (8th Cir. 1999). A companion decision concerns Mr. Mosby's co-defendant at trial. United States v. Patterson, 140 F.3d 767 (8th Cir.), cert. denied, 525 U.S. 907 (1998).

JURISDICTION

The Court of Appeals decision denying Mr. Mosby's Petition for Rehearing and Rehearing En Banc was filed on March 19, 2002. This Petition is filed within ninety days. Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty or property, without due process of law . . .

STATUTES

Title 21 U.S.C. 841, provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such personal shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .

(1)(B) In the case of a violation of subsection (a) of this section involving –

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers . . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . .

Title 28 U.S.C. 455, provides:

(a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

The Indictment against Mr. Mosby alleged a general conspiracy, setting out a range of dates, from "at least as early as July 1995, and continuing to on or about the date of this superseding indictment" It charged that Mr.Mosby along with sixteen others, "did knowingly and intentionally conspire and agree with each other . . . to . . . knowingly and intentionally manufacture and distribute methamphetamine, a Schedule II controlled substance . . ." (Count One). Since the decision of the Court of Appeals is similarly abbreviated, we take a moment to flesh out of the facts.

The case began on January 28, 1996, when the Missouri State Patrol stopped James Layne. In his car were five powder-filled baggies, weighing 122.5 grams, the purity 88 percent. (T. 5, 16-17). Mr. Layne, was delivering the methamphetamine to Robert Day, at the behest of Robert Widenmann. (T. 185). FedUp pills had been delivered to Widenmann's Warsaw home; there they had been refined into methamphetamine powder. (T. 36). Layne told authorities that he had delivered 19 to 20 ounces over the course of three trips. (T. 34).

Mr. Day's source was Jerry Patterson, who admitted that he had a "friend" in the pharmaceutical industry. (T. 36). The precursors to the methamphetamine came in the form of FedUp pills. (T. 57). Mr. Mosby supplied two boxes of the pills via FedEx to Mr. Patterson. (T. 59-60). Federal investigators traced the shipments from DMD Pharmaceutical, in Indiana, the packages delivered, eventually, to Springfield, Missouri on two occasions, and received by one of Mr. Patterson's bartenders, Kerry Miller. (T. 60, 85, 88, 192).

The exact quantity used for illicit purposes was left amorphous. The FedUp tablets were on sale at the Sunshine Saloon, Patterson's bar, for innocent use. (T. 67, 164).

Moreover, Patterson complained that Mosby was a deficient supplier at best, running out of the ephedrine pills from time to time. (T. 250).

The other key ingredient for the making of methamphetamine, red phosphorous, came from a source in Kansas City, left unnamed in the transcript, and not linked to Mr. Mosby. (T. 99).

As to specific quantity, the testimony was scattershot, e.g., that Day delivered methamphetamine to Patterson on four occasions, three or four ounces per. (T. 55-56). Theresa Law, over the course of the conspiracy, bought some 2.2 pounds from Patterson. (T. 268). Mr. Mosby himself sold methamphetamine, on isolated occasions (T. 249); two eight-balls (consisting of three grams) to Gary Ray Warren, in December of 1995. (T. 123, 147). To Tamara Stacy Sears, Mosby offered another eight-ball. (T. 310). Mosby personally used contraband supplied to him by Patterson. (T. 190).

After the Layne and Widenmann arrests, Gerald Patterson obtained his methamphetamine from Arkansas, the new source one Allen Ernst. (T. 554-56). Ernst supplied Patterson with two pounds of methamphetamine, through July, 1996 when the conspiracy was stopped by indictment. (T. 556).

The Government's chemist, Karen Renee McKinnis, found the percentage strength of other packages seized to vary, from 11 to 39 percent purity, respectively. (T. 537-544).

At sentencing, Mr. Mosby's counsel requested an elevated standard to be used to determine the drug quantity. Denying the motion, the Court opined, "[t]he standard is only by the preponderance of the evidence." Without specificity as to source, time, and witness testimony, the Court didn't "think there's any question but what there's between three and ten kilograms of meth produced." (Sent. Tr. pp. 5-6.). The Court refused as well to reach Mr. Mosby's individual responsibility,

required by the relevant conduct provisions of U.S.S.G. §1B1.3 (drug quantity conduct to include "all acts and omissions, . . . procured or willfully caused by the defendant.")

Mr. Mosby's motions to compel the government to establish an evidentiary basis for the drug quantity attributed to him, (T. Sent. T. p. 6), and to recalculate the alleged quantities based upon a different testing protocol were similarly denied, (Sent. Tr. pp. 6-8), as was his objection that the Guidelines, as applied, created an unwarranted disparity between the proposed sentence and the sentences received by his co-defendants. A term of 262 months (21 years, 10 months) was imposed on February 20, 1998.

On direct appeal, Mr. Mosby argued "that the amount of drugs attributed to him was incorrectly calculated and that the trial court should have given him a more lenient sentence because the jury's verdict was ambiguous." United States v. Mosby, 171 F.3d 1067, 1068 (8th Cir. 1999). In light of the changing sources of precursors, he claimed "that there were actually two separate conspiracies, and that drugs from only one of them should have been attributed to him for sentencing purposes." Id. at 1070. The Eighth Circuit disagreed, finding that the trial evidence "supports a conclusion that the period of time during which the co-conspirators did not have a source of methamphetamine was not a hiatus between conspiracies, but a mere change in personnel in an ongoing conspiracy." Id. at 1071.

The Circuit also turned back Mr. Mosby's related drug quantity challenge:

> Mr. Mosby also contends that the trial court erred in calculating the quantity of drugs that ought to be imputed to him in fixing his sentence. One witness for the government, however, testified that he picked up and delivered at least

567 grams of drugs produced at the Warsaw lab, including the 122.25 grams that the police seized and subsequently determined to be 88 percent pure methamphetamine. The amount seized was therefore 107.58 grams of actual methamphetamine. If all 567 grams delivered by the witness were of the same purity, the amount of actual methamphetamine would be 498.96 grams, which is far more than the 300 grams necessary to justify the sentence imposed.

Mr. Mosby maintains that it should not be assumed that the 444.75 grams not seized had the same purity as the portion that was seized. We disagree. Expert testimony offered by a government witness tended to prove that the purity of methamphetamine produced in a lab is usually between 85 and 95 percent. Given the fact that 88 percent is within this normal range of purity, and that the remainder of the methamphetamine was produced in the same lab by the same "cooks" who produced the portion determined to have a purity of 88 percent, the assumption that the purity would be consistent is manifestly reasonable. Mr. Mosby is therefore punishable for 498.96 grams of actual methamphetamine if it was foreseeable to him that this amount would be involved in the conspiracy.

The testimony of other witnesses tended in fact to show that Mr. Mosby provided necessary materials to the Warsaw lab for the purpose of "cooking" methamphetamine, and it was certainly foreseeable that his co-conspirators

> would do as planned and produce the amount of drugs attributed to him. Mr. Mosby is therefore accountable for that amount, and the trial court thus did not err in calculating his sentence.

Id. at 1070.

Whether the trial Judge was biased comprised the second issue on appeal. The premise of the argument, albeit a disturbing one, was that in previous civil litigation, Mosby v. Allscripts Pharmaceutical, Inc., File no. 92-3170-CV-S-4. Mr. Mosby had threatened to not only the lawyers in the case, but the presiding judge, Judge Clark, who would, in turn, try his criminal case just three years later. Judge Clark was in fact appraised of the threat by the lawyers. Appendix at pp. 16-19. But without a formal motion having been made in the criminal case, the Eighth Circuit found "nothing in the record before us that indicates that the trial judge knew of any threats on his life, if any in fact existed. . ." Id. at 168.

Within a year of the Eighth Circuit's opinion, on June 26th, 2000, Apprendi v. New Jersey, 530 U.S. 466 (2000) was decided.

On December 14th, 2000, Mr. Mosby filed a Motion to Vacate, pursuant to 28 U.S.C. 2255. He alleged, inter alia, and, following Apprendi's rationale, his quantity-based sentence was not premised upon an element found by the jury to be proven beyond a reasonable doubt. A second ground was his request for, at a minimum, discovery to prove a judicial bias in accordance with Bracy v. Gramley, 520 U.S. 899 (1997).

The petition was originally directed to Judge Clark, who conducted the trial. Mr. Mosby objected to the assignment and the litigation was transferred, for "good cause shown," Order of D. Brook Bartlett, Docket Entry 584, to District Court Judge Gary A. Fenner, who denied the motion the petition by Order

dated May 14, 2001. The Court ruled that while Mr. Mosby's indictment, and his jury instructions, did not reference a specific quantity of methamphetamine, and even though Apprendi had not been decided, Mr. Mosby's was nonetheless required to show "cause and prejudice" why he didn't insist that his jury decide the quantity level. (Order at p. 9). Yet the Court failed to mention that at the time of Mr. Mosby's trial, Eighth Circuit case law had firmly held that the jury was not required to do so. See e.g. United States v. Caldwell, 176 F.3d 898, 900 (8th Cir. 1999) (ruling that "drug quantity is an issue . . . to be determined after consideration by the district judge utilizing a preponderance of the evidence standard."). The District Court ruled in the alternative that the 262 month sentence did not violate Apprendi because Mr. Mosby could have been sentenced up to thirty years regardless of the methamphetamine amounts. (Order at p. 10). Mr. Mosby's request for an evidentiary hearing on the question of judicial bias was also denied, Court ruling that Mr. Mosby had already tried, albeit without a record, to litigate the matter on direct appeal. Ibid. Mr. Mosby's Motion to Reconsider was turned away on September 6, 2001.

The requisite Notice of Appeal and Motion for a Certificate of Appealability, 28 U.S.C. 2253 (c)(2), were filed. The Eighth Circuit denied Mr. Mosby's certificate without discussion, on January 29, 2002 and his request for rehearing and rehearing en banc on March 19, 2002. The respective Orders are appended, at pp. 1 and 2.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

In United States v. Cotton, No. 01-687 (filed May 20, 2002), this Court found plain error within an indictment, filed pre-Apprendi, that failed to set forth specific drug quantities, but ruled the error was harmless because it did not affect "the fairness, integrity, or public reputation of judicial proceedings." Slip Op. p. 5 (quoting United States v. Olano, 507 U.S. 725, 731 (1993)). The evidence of actual drug quantity was "overwhelming and essentially uncontroverted." Ibid. Police seizures alone justified the drug quantity-based sentence. That there was no objection to the finding of quantity at any moment during the trial or sentencing, and that the conspiracy was "vast," and co-conspirator testimony provided corroboration, also doomed Mr. Cotton's cause. Ibid.

This case takes the next, necessary step that cannot be avoided. Certiorari should be granted to determine a far more important claim as to what quality of proof is needed to enhance a sentence where, unlike Cotton, there is an objection to the Court's methodology of sentencing, and the hard evidence of drug quantity is not a matter of actual weights but instead an obtuse estimate. Evidence of a verbal kind, one witness testifying about ounces that may or may not have been delivered and that are no longer available for counting. Where another witness estimates the number of tablets of precursors that were cooked but did not yield a product (T. 562). Where sales were attempted but not consummated. (e.g. T. 310). Where transactions take place in the bar setting, the days and nights passing by with fluidity, a loss of perception, a sense of exaggeration, a later recounting by gin-soaked memory. While one may agree that Mr. Mosby conspired to distribute methamphetamine, the jury was not asked to make the much

harder decision here, the level of his involvement beyond a reasonable doubt, his relative importance measured by hard weight.

Our concern is implicit in the Eighth Circuit's opinion. The quantity, the Circuit inferred, was derived from the 122.5 grams first seized from co-defendant Layne, along an interstate highway. With a purity of 88 percent, the amount was 107.58 grams. 177 F.3d at 1071. The Apprendi error of the Eighth Circuit occurs in the assumption that 567 other grams of methamphetamine were delivered and that amount, taking into account the same purity, placed Mr. Mosby over the 300.00 pure grams. Ibid. Note, thought, the Eighth Circuit's opinion does not say that "beyond a reasonable doubt" Layne delivered the remaining ounces and there was no hard proof that he did. The Circuit instead assumes that Mr. Mosby could reasonably foresee that quantity, since he supplied some of the pills, but just how many is left unsaid, and the record is of little help. Adding to the confusion is that the Eighth Circuit's opinion rested on purity of methamphetamine, the trial Court on gross quantity. Mr. Mosby's indictment does not say either way.

Also within the Eighth Circuit's opinion is a critical distinction that this Court has yet to address but eventually must: what is the meaning of the Guidelines' term "foreseeability" in light of Apprendi? Federal sentences for drug offenses were transformed not only by the Sentencing Guidelines. See United States v. Mistretta, 488 U.S. 361 (1989). Along with the enactment, in 1986, of the mandatory minimums, 21 U.S.C. 841 (a)(1), drug offense punishment became quantity and role driven, and in theory a defendant who sells more, or who is a leader, should do elevated time. §§1B1.1 and 3B1.1; Cotton, Slip Op. at p. 6. A constitutional problem has arisen in that prison terms have been generated by witnesses and drugs that cannot be empirically tested, ounces added to

ounces that may or may not have been sold by witnesses who themselves have an incentive to testify about higher and higher quantities to give greater and greater discounts in their own respective sentences.

The only check to this circular invidiousness is to increase the burden of proof for sentencing enhancements, to say drug quantities may no longer be proven minimally, a view which was erroneously endorsed by a trial court content here with the "by the preponderance of evidence" standard, (Sent. T. 5). This was the change of course the Court suggested two years ago. See e.g., Blue v. United States, 531 U.S. 801 (2000) (case remanded "for further consideration in light of Apprendi"); Gibson v. United States, 531 U.S. 801 (2000) (same); Wims v. United States, 531 U.S. 801 (2000) (same); Jackson v. United States, 531 U.S. 953 (2000) (same), and so on. Following Apprendi, the Circuits accepted the elevated burden and pleading requirements. Cotton, Slip Op. at p. 3; e.g., United States v. Brough, 243 F.3d 1078, 1080 (7th Cir. 2001); United States v. Rebmann, 226 F.3d 521, 526 (6th Cir. 2000); United States v. Nordby, 225 F.3d 1053, 1058 (9th Cir. 2000); see also Harris v. United States, 00-10666, which will address the issue of whether the enhancement for "brandishing" in a firearms prosecution must be plead and proven beyond a reasonable doubt.

Specific to Mr. Mosby, the other recurring issue not addressed in Cotton's plain error analysis concerns Apprendi's impact on habeas corpus litigation where the sentencing enhancement issue was preserved. The Eighth Circuit has held Apprendi may not be even raised in an initial Section 2255 petition. See United States v. Moss, 252 F.3d 993, 995 (8th Cir. 2001), cert. denied, 122 S.Ct. 848 (2002). The Apprendi issue is barred as well on successive petitions. Rodgers v. United States, 229 F.3d 704, 706 (8th Cir. 2000) (per curiam).

"Together, Moss and Rodgers have snuffed out nearly every effort by federal prisoners to gain review of their sentences under Apprendi." United States ex rel. Perez v. Warden, FMC Rochester, WL 421666 (8th Cir. May 12, 2002). The Eighth Circuit went even further, holding that "a federal prisoner may never ventilate an Apprendi issue in a §2255 motion." Id. at p. 2 (emphasis added). At least the Eighth Circuit conceded that federal inmates "are hamstrung because the Supreme Court has not yet ruled (and indeed many never rule) that Apprendi applies retroactivity to past criminal convictions." Id. at p. 2. "And only the Court may declare Apprendi's new rule to have retroactive force . . ." Id. at p. 3 (citing Tyler v. Cain, 121 S.Ct. 2478 (2001)).

Our brother and sister circuits have refused, without higher guidance of the kind we seek, to find that Apprendi and Jones v. United States, 526 U.S. 227, 248 (1999) announced a new rule, as defined in Teague v. Lane, 489 U.S. 288, 304-310 (1989), of the kind that should be applied retroactively. See, e.g., Jones v. Smith, 231 F.3d 1227, 1234-35 (9th Cir. 2000); United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001); In re Turner, 267 F.3d 225, 228-31 (3rd Cir. 2001); Forbes v. United States, 262 F.3d 143, 145 (2nd Cir. 2001).

The Eighth Circuit and other circuits have thus decided an important question of federal law that should be ultimately settled by this Court. Rule 10 (b), Rules of the Supreme Court. Mr. Mosby's petition should be granted to determine whether Apprendi must be applied to not only drug quantity and forseeability, but the Sec. 2255 litigation. Mr. Mosby's maximum penalty is governed by the statute that does not set out an amount. That portion of the drug statute calls for no more than twenty years, less time than he received. 21 U.S.C. 841 (b)(1)(C).

The second reason that Certiorari should be granted is that the lower Court refused to apply Bracy. Mr. Mosby raises a significant issue of bias that should be probed. It is not the sort of thing that makes the judiciary jump up and down, but it is an issue that determines how fair our Court system is, for "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).

Neutrality has long been a stated ideal. Tumey v. Ohio, 273 U.S. 510, 522 (1927). The probability of unfairness is hence abhorred. Withrow v. Larkin, 421 U.S. 35, 47 (1975). This Court has pointed out that "no man is permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955). For these reasons, the judicial disqualification statute, 28 U.S.C. 455, "was designed to promote public confidence in the integrity of the judicial process," Liljeberg v. Health Services Acquisition Services Corp., 486 U.S. 847, 859 n. 7 (1985). It requires disqualification even if no actual bias is shown. E.g., United States v. Tucker, 78 F.3d 1313, 1324-25 (8th Cir. 1996). Trial before a biased court creates a structural error, and cannot be harmless. See Neder v. United States, 527 U.S. 1, 8 (1998) (citing Tumey).

Mr. Mosby, who was mentally unstable and suicidal at the time, threatened to kill various litigants to his employment lawsuit, including Judge Clark. The Eighth Circuit opined that Judge Clark may not have been aware of the threats, 177 F.3d at 1068-69, yet the record says otherwise. The affidavit of William C. Wilder, an associate with the firm defending Mr. Mosby's claim, indicated that the police "were concerned about possible harm to the Judges involved . . ." Wilder affidavit, p. 2, Appendix at p. 15. Judge Clark was concerned enough about the threats to issue an Order directing the parties to advise him as to Mr. Mosby's arrest status. Order of March 10, 1993, Appendix at p. 17. Mr. Mosby's own counsel, Kevin Curran,

was contacted by the United States Marshal, and was informed of an investigation regarding the threat to Judge Clark. Curran affidavit, Appendix at p. 19.

Title 28 U.S.C. 455 sets forth no procedure for seeking recusal. Liteky v. United States, 510 U.S. 540, 544 (1994) (generally interpreting §455 to place an "obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit."). To remedy the Eighth Circuit's erroneous view that the record was somehow vacant, Mr. Mosby requested discovery as part and parcel of his §2255 Petition.

In Bracy v. Gramley, 520 U.S. 899 (1997), the question was when and under what circumstances discovery under Rule 6 (a), Rules Governing Sec. 2255 Petitions, should be allowed to support a claim of judicial bias. Id. at 903. In Bracy, the petitioner was tried before a Chicago Judge who himself was later convicted of "conspiracy, racketeering, extortion, and obstructing justice." Id. at 902. In post-conviction pleadings, Mr. Bracy claimed that because his judge had been found guilty of corrupting trials that had taken place near the time of his, "good cause" for discovery had been shown. Id. at 903. As the Ninth Circuit has since pointed out, Mr. Bracy's claim was of a "conjectural nature," "entirely circumstantial," and "depended upon a yet unproved but plausible theory." Summerlin v. Stewart, 267 F.3d 926, 952-53 (9th Cir. 2001). This Court granted discovery nonetheless. The rank appearance of judicial impropriety sufficed. Id. at 907. It does here, too.

Several Circuit decisions have recognized the substance of Mr. Mosby's claims where the bias is even more remote. In Summerlin, the habeas petition was premised on the fact that the trial judge, later convicted of conspiracy to possess marijuana, and may have been high during his trial. Id. at 949. The petitioner was allowed, though discovery and investigation, "to

develop the connection, if any, between the judge's chronic use of illegal drugs, his alleged addition, and his performance during this case as a judge." Id. at 953. See also United States v. Antar, 53 F.3d 568, 573 (3rd Cir. 1995) (once the possibility of judicial bias has been established, defensible rulings may become suspect; the Court's suggestion, at sentencing, that his pre-trial intent was to "get back to the public that which was taken from it as a result of fraudulent activities of this defendant and others" sufficient cause for removal); Tucker, 78 F.3d at 1324-5 (District Court's long association with individuals related, politically, to defendants justified prosecution motion to recuse, and, "[a]s a practical matter, there is no shortage of other judges" who could hear the case).

Mr. Mosby's claim is realized in what is the most important aspect of almost any criminal case: the sentence imposed, which is in part driven by the subjective thoughts of the trial judge. Of the 16 co-defendants, Mr. Mosby received the highest sentence. Whether or not the quantum of Mr. Mosby's freedom was derived from a past threat must be explored. How can it be said that the threat upon one's life would have no impact and be forgotten. Mr. Mosby's claims are far more compelling than Mr. Bracy's. Bracy, 520 U.S. at 909.

Certiorari should be granted on this issue as well, which calls out "for an exercise of this Court's supervisory power." Rule 10 (a), Supreme Court Rules; see also McNabb v. United States, 318 U.S. 332, 341 (1943) ("the administration of justice in the federal courts" calls for this Court's supervisory role).

CONCLUSION

Based upon the foregoing, Mr. Mosby requests that his petition for writ of certiorari to the Eighth Circuit be granted and the matter be remanded for further discovery, or in the alternative, for re-sentencing.

Respectfully submitted,

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APPENDIX INDEX

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3288

Joseph Trent Mosby, Appellant,	*	
v.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
United States of America, Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

March 19, 2002

Order Entered at the Direction of the Court:

s/Micheal E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3288

Joseph Trent Mosby,	*
Appellant,	* Appeal from the United States
v.	* District Court for the
	* Western District of Missouri
United States of	*
America,	*
Appellee.	*

Before MCMILLIAN, MORRIS S. ARNOLD and BAYE, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. (5361-010199)

January 29, 2002

Order Entered at the Direction of the Court:

s/Micheal E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JOSEPH TRENT MOSBY,	)	
Petitioner,	)	
	)	Case No.
vs.	)	00-3513-CV-S-4-P-ECF
	)	Crim. No. 96-03008-CR-S-4
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	ECF

ORDER DENYING MOVANT'S § 2255 MOTION

Movant was convicted of conspiracy to manufacture and distribute methamphetamine following a jury trial. This Court, pursuant to the Sentencing Guidelines, sentenced the movant to 262 months imprisonment. The movant's conviction and sentence were upheld on appeal. *See United States v. Mosby, 177* F.3d 1067 (8th Cir. 1999), *cert. denied,* 528 U.S. 1196 (2000).

On December 14, 2000, the movant filed this Motion to Vacate pursuant to Title 28, U.S.C. § 2255. The movant's § 2255 motion raises five grounds for relief. (1) judicial bias from the district court judge; (2) the movant's sentence was "unlawfully" determined; (3) ineffective assistance of appellate counsel; (4) ineffective assistance of trial counsel; and (5) the sentence was in violation of the recent Supreme Court case of *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000).

(1) **Movant's claim of judicial bias**

The movant asserts that the trial judge in his case, the Honorable Judge Russell Clark, was "biased" in the criminal case because the movant had earlier threatened the judge's life during a civil action in 1993.

The document referred to by movant to show that he had previously threatened Judge Clark does not mention Judge Clark by name, nor does it make a threat against Judge Clark. Instead, the document cited by movant refers to threats made by the movant to several officials of a company whom the movant was suing, and an Illinois State trial judge. Judge Clark stated that he was not aware of any threat on his life from the movant.

Additionally, the movant raised this identical ground in his direct appeal. The Court of Appeals rejected the argument, finding "nothing in the record before us that indicates that the trial judge knew of any threats on his life." *Mosby,* 177 F.3d at 1068-69. The movant cannot now relitigate this issue. *United States v. McGee,* 201 F.3d 1022, 1023 (8th Cir. 2000) (issues decided on appeal cannot be relitigated in § 2255 proceedings).

(2) **Movant's claim of receiving an unlawful sentence because of relevant conduct amounts**

The movant claims in the second ground raised in his § 2255 motion that the Court of Appeals erred in affirming the district court's sentence of the movant to a relevant conduct amount of 3 to 10 kilograms of methamphetamine or 300 to 1,000 grams of actual methamphetamine during the course of the conspiracy. At trial, the United States produced evidence that during the conspiracy, the United States was able to seize 122.25 grams of methamphetamine attributable to the conspiracy which was tested at 88% pure methamphetamine. Further witness testimony attributed an additional 444.75 grams of methamphetamine to the conspiracy.

On direct appeal, the movant argued that the trial court erred in its drug calculations. The Eighth Circuit, when confronted with this issue on direct appeal, held that the sentencing court could find the conspiracy consisted of over 300 grams of actual methamphetamine. The Court stated that: [Movant] maintains that it should not be assumed that the 444.75 grams not seized had the same purity as the portion that was seized. We disagree. Expert testimony offered by the government witness tended to prove that the purity of methamphetamine produced in a lab is usually between 85 percent and 95 percent. Given the fact that 88 percent is within this normal range of purity, and that the remainder of the methamphetamine was produced in the same lab by the same "cooks" who produced the portion determined to have a purity of 88 percent, the assumption that the purity would be consistent is manifestly reasonable. *Mosby,* 177 F.3d at 1071.

The movant suggests that the calculations by the Court of Appeals showed that the Court rejected the trial court's determinations as to drug amounts, and instead created, out of whole cloth, a new drug calculation based on actual methamphetamine. When reviewing a relevant conduct determination, the Court of Appeals reviews the district court's determination under a clearly erroneous standard, and will reverse the determination only if "the entire record definitely and firmly convinces us that a mistake has been made." *Mosby,* 177 F.3d at 1070 (quoting *United States v. Sales,* 25 F.3d 709, 711 (8' Cir. 1994). The sentencing court, during the movant's sentencing stated "[I] heard the evidence in this case, and I think it is clear that there was between three and ten kilograms of meth produced." Although the district court did not address U.S.S.G. § 1 B 1.3, nor did the sentencing court articulate the evidence upon which it made its findings, the Court of Appeals is not limited to reasons given by the trial court as to the relevant conduct

determination and may affirm on any grounds supported by the record. *United States v. Garrido,* 995 F.2d 808, 813 (8" Cir. 1993). The Court of Appeals affirmed the sentencing court's relevant conduct determination based on evidence not in dispute by the movant.

Furthermore, the movant's second ground is another attempt to raise an issue already fully litigated before the Court of Appeals. Because the Court of Appeals ruled adversely to the movant's position does not give the movant the right to raise the issue again in a § 2255 action. *United States v. McGee,* 201 F.3d at 1023.

(3) **Ineffective Assistance of Appellate Counsel**

Movant, in his § 2255 motion, asserts that his appellate counsel was ineffective. A movant "faces a heavy burden" to establish ineffective assistance of counsel pursuant to Section 2255. *United States* v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). The sustain his ineffective assistance of counsel claim, the movant must show "his counsel's representation was deficient and that the rejudiced the defendant's case." *Cheek v. United States,* 858 F.2d 1330, 1336(8 th Cir. 1988) *(citing Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). If the movant cannot prove prejudice, there is no need to address whether counsel's performance was deficient. *See Apfel,* 97 F.3d at 1076. To establish prejudice, the movant must prove a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *See Cheek,* 858 F.2d at 1336 (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052); *See also DeRoo v. United States,* 223 F.3d 919, 925 (8th Cir. 2000). Conclusory allegations as to these proof requirements do not entitled movant to a hearing. *Strickland, id.,* at 694.

None of the movant's allegations concerning the performance of his appellate counsel rise to the high level

necessary to show that the movant was prejudiced by the appellate counsel's representation. First, the movant alleges that the appellate counsel abandoned him by conceding his guilt as to "the only genuine issue of fact." The affidavit of appellate counsel, Mr. Nigro, shows that he did not "concede" the movant's guilt, but instead argued that the evidence did not establish that the movant knew that the pseudoephedrine that he supplied to the co-defendants was being used to manufacture methamphetamine. The movant admits in his *pro se* motion that he supplied pseudoephedrine to "the Sunshine Saloon." Movant's contention is that he "never admitted any knowing participation in the illegal diversion of the legal tablets he sold. . . ." *Id.*

This is the same argument made by Nigro at the Court of Appeals. *See Mosby,* 177 F.3d at 1069. Movant does not suggest that he did not, in fact, sell the pseudoephedrine in his Section 2255 motion. Movant, instead, is upset because his appellate counsel was not successful in making the argument. However, reasonable legal strategy does not constitute ineffective assistance of counsel simply because it was not successful. *James v. State of Iowa,* 100 F.3d 586, 590 (8th Cir.1996).

Second, the movant argues that the appellate counsel failed to preserve his "*Pro Se* Motion to Suppress Evidence" and also the grounds related to that motion which he raised in a *pro se* brief to the Court of Appeals. These pro *se* filings concern the admission into evidence at the movant's sentencing hearing, and of a videotape statement made by the movant after his arrest where he admits to selling the pseudoephedrine, but denies knowing it was being used to manufacture methamphetamine.

Mr. Nigro denies failing to preserve the movant's claims before the Court of Appeals. Nigro refused to argue the claims orally before the Court of Appeals because he felt they lacked merit. The sentencing court consideration of the videotape which had been previously excluded from evidence before the jury did not impact the sufficiency of the evidence convicting the movant, because the jury did not consider the tape. Additionally, the tape in no way impacted the relevant conduct amounts arrived at by the sentencing court, since those amounts were found in the trial record itself. *Mosby,* 177 F.3d at 1070-1071. The movant cannot show any prejudice from the appellate counsel's representation on this ground.

Third, the movant complains that appellate counsel failed to preserve a motion under Title 28, United States Code, Section 2106, which allows courts of appeal to vacate, set aside, or remand lower court decisions. Specifically, the movant was seeking a new judge on remand. However, as counsel explains in his affidavit, before the movant could seek anew judge on remand, he would have to convince the Court of Appeals to overturn his conviction or sentence. This the Court of Appeals did not do. The movant, therefore, did not *suffer* "prejudice."

(4) **Ineffective Assistance of Trial Counsel**

The movant also alleges that his trial counsel, **Thomas Patrick Deaton,** was ineffective in his representation of the movant. The same standards that-applied in examining the movant's appellate representation apply also in examining his trial representation. To sustain his ineffective assistance of counsel claim, the movant must show "his counsel's representation was deficient and that the deficient performance prejudiced the defendant's case." *Cheek v. United States,* 858 F.2d at 1336; (citing *Strickland v. Washington,* 466 U.S. 668). If the movant cannot prove

prejudice, there is no need to address whether counsel's performance was deficient. *See Apfel,* 97 F.3d at 1076. To establish prejudice, the movant must prove a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *See Cheek,* 858 F.2d at1336.

First, the movant asserts that his trial counsel was ineffective in failing to negotiate and obtain a favorable plea bargain from the United States in his case. There is a duality in the movant's arguments, which on one hand suggests that he is actually innocent of the crime he was convicted of, and on the other hand states that he would have pled guilty to the charges if his attorney had negotiated an acceptable plea agreement. In order to satisfy the prejudice prong of the ineffective assistance of counsel test, the movant who claims to have received ineffective assistance of counsel which resulted in his rejection of a plea bargain has to show that, but for the counsel's advice, he would have accepted the plea bargain. *Engelen v. United States,* 68 F.3d 238, 240 (8th Cir. 1995).

The record cited by the movant is "completely barren" of any evidence that the movant would have acknowledged his guilt prior to trial. A review of the letters allegedly written between trial counsel and the movant show that the movant maintained he was not guilty. Trial counsel urged the movant if he, in fact, was guilty, to consider plea negotiations with the government. When the movant wished to negotiate a plea bargain with the government, counsel wrote a letter requesting an offer from the government. As trial counsel's affidavit indicates, it was the movant not counsel who made the decision to not accept the government's plea bargain offer. The movant wanted a plea agreement from the government that would have given his probation, and when that offer did not come, the movant took his chances with the jury. The

movant rejected a plea offer from the government, and asserted his rights to trial. This certainly is the movant's prerogative, but if the choice goes badly for the movant, he cannot later complain that his attorney's actions somehow prejudiced, causing him not to plea guilty, when it is clear that the movant was not going to plead to a plea offer which did not involve the possibility of probation.

Second, the movant asserts that trial counsel prevented him from testifying at trial. As counsel's affidavit asserts, the movant made the decision not to testify. The movant did not, either at the trial or sentencing phase of the case, complain to the court that counsel prevented him from testifying. Of course, the movant had an absolute right to testify, or not testify, but that decision was his alone to make.

Third, the movant asserts that trial counsel was ineffective in placing into evidence at the sentencing hearing a videotape which showed the movant discussing his role in the sale of the pseudoephedrine to the conspiracy. The videotape did not consist of a "confession" by the movant of the crime, but instead was offered to support the movant's assertions that he sold the pseudoephedrine as a legitimate businessman without knowledge that the pseudoephedrine was being useed to manufacture methamphetamine.

The movant suffered no prejudice from the admission of the videotape. The movant had already been convicted of the crime, and the jury did not see the tape. The movant in the tape does not admit to committing a crime, but instead denies his involvement in the methamphetamine conspiracy. The admission of the tape represented a legitimate strategy on counsel's part to introduce evidence which might mitigate the movant's potential sentence, without calling the movant as a witness. Finally, the videotape did not prejudice the movant since the sentencing court sentenced the movant to the low end of the applicable guideline range, 262 months.

Fourth, the movant complains that trial counsel presented no defense in the criminal trial. As counsel's affidavit explains, however, the movant did not provide counsel with the names or addresses of potential witnesses who could support the movant's allegations that he was simply a legitimate businessman selling pseudoephedrine without knowledge of the ultimate use of the product. Counsel was able to vigorously represent the movant, and also present to the jury the movant's theory of the case, without the need to present evidence or call the movant as a witness. This legitimate trial strategy is not ineffective simply because it was unsuccessful. *James v. State of Iowa, 100* F.3d at 590.

(5) **Movant's *Apprendi* Claim**

Under the fifth ground raised in his Section 2255 motion, the movant asserts that his conviction and sentence are "constitutionally unreliable" because neither the indictment nor the jury instructions plead the amount of methamphetamine attributable to the conspiracy. Under *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000), a defendant can only be subjected to an increased statutory maximum penalty based on the quantity of drugs, if that quantity of drugs is proved to a jury beyond a reasonable doubt. *United States v. Aguayo-Delgado,* 220 F.3d 926, 933-34 (8th Cir. 2000). *Apprendi* held that "other than the fact of a prior conviction, *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi, 120* S.CL At 2363.

Nonetheless, to obtain collateral relief the movant must show "cause and prejudice," because he did not contend at his trial in 1996 that. the jury must determine the quantities of drugs involved in the conspiracy. *See United States v. Frady,* 456 U.S. 152 (1982). The movant may argue that his

neglect is excused because *United States v. Jones,* 526 U.S. 227, 243 n.6 (1999), represented the Supreme Court's first express statement that the Constitution requires issues of this kind to be resolved by juries. However, the lack of precedent for a position differs from "cause" for failing to make a legal argument. As the Seventh Circuit has recently noted:

> [E]yen when the law is against a contention, a litigant must make the argument to preserve it for later consideration. See Bousley v. United States, 523 U.S. 614, 622-24, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); Engel 456 U.S. at 130 n. 35 (that a legal argument would have been unpersuasive to a given court does not constitute "cause" for failing to present that argument). "Cause" means some impediment, and Smith does not contend that any outside force impeded his legal defense in 1992. (Nor does he contend that counsel was ineffective for failure to anticipate Apprendi; no such argument would be tenable.) The lack of any reasonable legal basis for a claim may constitute "cause," see Reed v. Ross, 468 U.S. 1, 16 (1984), but the foundation for Apprendi was laid long before 1992. Other defendants had been making Apprendi-like arguments ever since the Sentencing Guidelines came into being, and in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 22411, 91 L.Ed.2d 67 (1986), the Court addressed on the merits an argument along similar lines. Smith could have invoked the themes in McMillan, and for that matter In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), just as the justices themselves did in Annrendi. See Garrott v. United States, No. 99-2921 (7" Cir. Jan. 30,

> 2001). Thus, Smith has not established cause; and for the same reason that he could not show plain error (if that were the right standard) he cannot show prejudice either.

United States v. Smith, _____ F.3d, 2001 WL 111590, *2(7th Cir. February 8, 2001).

The actual prejudice standard is a significantly higher hurdle than the showing required to establish plain error on direct appeal. *See Frady,* 456 U.S. at 166. The movant must show that the error in failing to ask the jury to determine the relevant drug amounts by proof beyond a reasonable doubt, "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. The movant also must show a substantial likelihood that a properly-instructed jury would have found a lesser amount of relevant conduct which would have lead to a lesser sentence, or would even have acquitted him. *Id.* at 172; *See also Swedzinski v. United States,* 160 F.3d 498, 501 (8th Cir. 1999).

Such a "substantial likelihood" does not exist in this case. The movant cannot show prejudice in this case, because the movant's sentence of 262 months is still appropriate under *Apprendi.* The Court of Appeals, in *Aguayo-Delgado,* 220 F.3d at 933, held that *Apprendi* did not preclude a sentence of up to 30 years which is the maximum that the movant could have been sentenced under Title 21, United States Code, Section 841(b)(1)(C), without regard to methamphetamine amounts, as a prior convicted drug felon. The movant, in the present case, was sentenced to 262 months, well below the 360 month limit under Section 841(b)(1)(C). Therefore, the movant suffered no prejudice and there is no need for resentencing.

A § 2255 petition can be dismissed without a hearing if: (1) the petitioner's allegations, accepted as true, would not entitled the petition to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible or conclusions rather than statements of fact.'" *Delgado v. United States,* 162 F.3d 981, 983 (8th Cir. 1998) *(quoting Engelen v. United States,* 68 F.3d 238, 240 (8th Cir. 1995)). The motion, files and records in this case conclusively demonstrate that movant is not entitled to relief; consequently, no evidentiary hearing is required herein. *Blankenship* v. *United States,* 159 F.3d 336, 337 (8th Cir. 1998), *quoting Engelen* v *United. States,* 68 F.3d 238, 240 (8th Cir. 1995). WHEREFORE, for the reasons stated herein, movant's Motion to Vacate his Sentence and Conviction under Title 28, U.S.C. § 2255 is DENIED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: May 14, 2001

UNITED STATES DISTRICT COURT WESTERN DISTRICT MISSOURI SOUTHERN DIVISION

J. TRENT MOSBY,	)
Plaintiff,	)
	)
.vs.	) No. 92-3170-CV-S-4
ALLSCRIPS	)
PHARMACEUTICALS,	)
INC.,	)
Defendant.	)

EMERGENCY MOTION TO APPRAISE THE HONORABLE RUSSELL G. CLARK OF THE PLAINTIFF'S ACTIVITIES AND THREATS

Defendant, Allscrips Pharmaceuticals, Inc. ("Allscrips"), respectfully requests this Honorable Court for the opportunity to appraise the Honorable Russell G. Clark of Plaintiff's activities and death threats. In support of this Motion, Allscrips states as follows:

1. On February 23, 1993, Plaintiff informed his current employer that he was going to kill several of Allscrips' officers and employees. The Plaintiff has previously threatened the life of other persons involved in this litigation and in a related matter entitled Allscrips Pharaceuticals, Inc. v.j. Trent Mosby, No. 92 CH 255 pending before Judge Peter Trobe in Lake County, Illinois.

2. Plaintiff's current employer informed the Vernon Hills Police Department of Plaintiff's threats.

3. The Vernon Hills Police Department, after conducting an investigation, asked Allscrips' attorney to inform Judge Trobe and Judge Clark that their lives might be endangered.

4. Allscrips' facilities remain under surveillance by the Vernon Hills Police Department and a warrant has been issued for the arrest of Plaintiff. However, the police have been unable to locate Plaintiff.

5. On February 25, 1993, Judge Peter-Trobe granted Allscrips' Motion for a Temporary Restraining order barring Plaintiff from approaching within 500 yards of Allscrips' facilities or threatening Allscrips' offices, agents and employees. A copy of Judge Trobe's Order is attached hereto as Exhibit A.

6. The affidavit of William C. Wilder, one of Allscrips' attorneys is attached hereto as Exhibit B. WHEREFORE, Defendant, Allscrips Pharmaceuticals, Inc., respectfully requests this Honorable Court for the opportunity to appraise the Honorable Russell G. Clark of Plaintiff's activities and death threats.

ALLSCRIPS PHARMACEUTICALS, INC.
By: s/ One of its attorneys

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

J. TRENT MOSBY,	)
Plaintiff,	)
	) No. 92-3170-CV-S-4
vs.	)
ALLSCRIPS	)
PHARMACEUTICALS,	)
INC.,	)
Defendant.	)

ORDER

On February 9, 1993 the Court granted counsel for plaintiff leave to withdraw. It also directed plaintiff to respond to defendant's motion to dismiss on or before February 26, 1993. On February 24, 1993 plaintiff filed a response to defendant's motion to dismiss and what appears to be an amended complaint in long hand. On February 26, 1993 defendant filed a pleading which notified the Court that plaintiff had threatened to kill Judge Trobe, Circuit Judge in Lake County, Illinois and personnel of the defendant company. In addition local counsel for defendant informed this Court's law clerk that plaintiff had attempted to commit suicide in Oklahoma. It is ORDERED that defendant is directed to advise the Court of plaintiffs status on or before
March 19, 1993.
Date: March 10 , 1993
RUSSELL G. CLARK,
SENIOR JUDGE UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 98-1597

UNITED STATES OF AMERICA)
Appellee,)
)Appeal from the United
)States District Court for the
)Western District of Missouri
JOSEPH TRENT MOSBY)
Apppellant.)
v.

AFFIDAVIT OF KEVIN P. CURRAN

STATE OF MISSOURI)
)ss.
COUNTY OF GREEN)

COMES NOW Kevin P. Curran being duly sworn, and hereby deposes and states as follows:

1. That I am an attorney licensed to practice law in the State of Missouri.
2. That during the years of 1992 and 1993 I represented Joseph Trent Mosby in a lawsuit filed in the United States District Court for the Southern, District of Missouri in a case styled Mosby v. Allscrips Pharmaceutical, Inc., case number 92 -3170-CV-SS-4. The Honorable Russell G. Clark acted as the *Trial* Court Judge in that cause of action.
3. The Joseph Trent Mosby whom I represented is one and the same as the Joseph Trent Mosby named as Appellant in the above-styled cause.
4. I am aware that a document was filed in the casc file of case number 92-3170-CV-SS-4 entitled "EMERGENCY

MOTION TO APPRISE THE HONORABLE RUSSELL G. CLARK OF THE PLAINTIFFS ACTIVITIES AND THREATS" In paragraph tree of this Motion Judge Clark was advised that his life might be endangered.

5. During my representation of Mr_ Mosby or immediately following my representation in the calendar years of 1992 or 1993, I was contacted by a Federal Marshal who stated that he was investigating a threat on the Honorable Russell G. Clark's life. This Federal Marshal questioned me about any knowledge I might have about this threat.

FURTHER, AFFIANT SAYETH NOT.

s/KEVIN P. CURRAN

Subscribed and sworn to before me, a Notary Public, this 6th day of July, 1999.

United States Court of Appeals
For The Eighth Circuit

No. 98-1587

United States of America,	*
	*
Appellee,	*
	*
	* Appeal from the United States
v.	* District Court for the
	* Western District of Missouri.
Joseph Trent Mosby,	*
	*
Appellant.	*

Submitted: January .12, 1999
Filed:June 3, 1999

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

A jury convicted Joseph Trent Mosby of conspiracy to manufacture and distribute methamphetamine and the trial court sentenced him to 262 months' imprisonment. Mr. Mosby appeals his conviction on 'the grounds that the judge was biased and should have recused himself, that the evidence was insufficient to support a conviction, and that much of the government's case was based on the testimony of "paid" witnesses; and he appeals his sentence on the grounds that the amount of drugs attributed to him was incorrectly calculated and that the trial court should have given him a more lenient

sentence because the jury's verdict was ambiguous. We affirm the judgment of the trial court.[1]

I.

Mr. Mosby argues that the trial judge erred by failing to recuse himself sua sponte pursuant to 28 U.S.C. § 455(a). Mr. Mosby maintains that during a previous case he had made threats on the judge's life that were communicated to the judge through a motion filed with the court, and he therefore contends that the judge could not possibly have approached the trial in this case without bias.

Having reviewed the relevant motion, however, we find no mention of any threats made against the judge himself; the motion informs the judge only of threats that Mr. Mosby allegedly made against other people involved in that litigation. There is thus nothing in the record before us that indicates that the trial judge knew of any threats on his life, if any in fact existed, so Mr. Mosby's contention that the judge should have recused himself is without merit.

II.

Mr. Mosby next contends that the evidence was insufficient to support his conviction. When considering a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, and reverse " 'only if we conclude that a reasonable fact-finder must have entertained a reasonable doubt about the government's proof " of one of these elements. United States v. Bascope-Zurita, 68 F.3d 1057, 1060 (8th Cir. 1995), cert. denied, 516 U.S. 1062 (1996), quoting, United States v. Ivey, 915 F.2d 380, 383 (8th Cir. 1990).

[1]The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

To convict a defendant of conspiracy, the government must prove beyond a reasonable doubt that there was a conspiracy clear that a reasonable fact-finder could have found Mr. Mosby guilty beyond a reasonable doubt.

III.

Mr. Mosby contends that the testimony of two co-conspirators who testified for the government should have been excluded because they were promised leniency by the government in exchange for their testimony --a violation, he argues, of 18 U.S.C. § 201(c)(2), which criminalizes the exchange of "anything of value" for "testimony under oath or affirmation given or to be given ... as a witness upon a trial." Because this argument was not raised at trial, we may reverse only if the trial court committed plain error in admitting the evidence in question. See Fed. R. Crim. P. 52(b); see also, e.g.,United States v. Millard, 139 F.3d 1200, 1203 (8th Cir. 1998), cert. denied, 119 S. Ct.376 (1998).

Of the numerous circuit courts that have considered the argument that such plea agreements violate § 201(c)(2), only one has found it persuasive, see United States v. Singleton, 144 F.3d 1343, 1345-51 (10th Cir. 1998), vacated, 144 F.3d 1361 (10th Cir. 1998) (en banc), and even that result was undone en banc, see United States v. Singleton, 165 F.3d 1297, 1299-1302 (10th Cir. 1999) (en banc),petition for cert. filed 12 (Mar. 31, 1999). We have, moreover, already joined all of the other circuits that have addressed this issue by ruling that "the statute does not sweep so broadly as to prevent prosecutors from offering leniency to an individual in exchange for truthful testimony." United States v. Johnson, 169 F.3d 1092, 1098 (8th Cir. 1999). We therefore hold that it was not plain error to allow the testimony of the two co-conspirators.

IV.

Mr. Mosby contends that it was unclear whether the jury convicted him of conspiracy to manufacture, conspiracy to distribute, or both, and argues that, where there is an ambiguous verdict, a defendant must be sentenced in the lowest range that the verdict's permissible interpretations will allow. It is true that, given an ambiguous verdict, a court should sentence the defendant based on the interpretation of the verdict that produces the lowest sentence, see, e.g., United States v. Baker, 16 F.3d 854, 857-58 (8th Cir. 1994), but in this case the sentence would be the same however the verdict is interpreted.

Mr. Mosby contends that his sentence would have been lower if he had been sentenced only for conspiracy to distribute. We disagree. A sentence for conspiracy to distribute or conspiracy to manufacture is determined by the amount of the drugs involved in the conspiracy that were reasonably foreseeable to the defendant. See U.S.S.G. §1B1.3(a)(1)(b). The portion of the record on which we rely in affirming the sentence that was imposed (seethe next section) consists of testimony from a witness who delivered drugs from the manufacturers to the distributors. The entire amount in these deliveries, therefore, was already out of the hands of the manufacturers and had become part of a conspiracy to distribute. As a member of this conspiracy to distribute, it was reasonably foreseeable to Mr. Mosby that there would be other distributors like himself, and that this amount of drugs would be involved. Any ambiguity in the verdict therefore could have made no difference in his sentence.

V.

Mr. Mosby maintains, finally, that the trial court erred in determining his sentence. "We review the district court's determination of drug quantity under a clearly erroneous standard," and will reverse "only if the entire record definitely and firmly convinces us that a mistake has been made." United States v. Sales, 25 F.3d 709, 711 (8th Cir. 1994).

The trial court sentenced Mr. Mosby at an offense level of 34, which requires a finding that there were between 300 and 1,000 grams of actual methamphetamine, or 3 to 10 kilograms of a mixture including methamphetamine, involved in the offense. See U.S. S.G. § 2D 1.1(c)(3) (Nov.1,1995). Although Mr. Mosby admits, as he must, that he-is accountable for all of the methamphetamine that was reasonably foreseeable to him, he raises a number of objections to the amount of drugs attributed to him for sentencing purposes. Mr. Mosby first contends that there were actually two separate conspiracies, and that drugs from only one of them should have been attributed to him for sentencing purposes. The first conspiracy, the argument goes, ended when its leader lost his first source of methamphetamine in Warsaw, Missouri, and the second conspiracy began a month later when he acquired a second source in Arkansas. Mr. Mosby contends that he was involved in the first conspiracy only, and that the trial court improperly considered drugs from the second conspiracy in calculating the offense level for his sentence.

But the trial evidence, on which the court relied in fixing Mr. Mosby's sentence, supports a conclusion that the period of time during which the co-conspirators did not have a source of methamphetamine was not a hiatus between conspiracies, but a mere change in personnel in an ongoing conspiracy. This conclusion is buttressed by the fact that many of the same people remained involved with each other

and sought to achieve the same objectives after the source of drugs had changed.

Mr. Mosby also contends that the trial court erred in calculating the quantity of drugs that ought to be imputed to him in fixing his sentence. One witness for the government, however, testified that he picked up and delivered at least 567 grams of drugs produced at the Warsaw lab, including the 122.25 grams that the police seized and subsequently determined to be 88 percent pure methamphetamine. The amount seized was therefore 107.58 grams of actual methamphetamine. If all 567 of the grams delivered by the witness were of the same purity, the amount of actual methamphetamine would be 498.96 grams, which is far more than the 300 grams necessary to justify the sentence imposed.

Mr. Mosby maintains that it should not be assumed that the 444.75 grams not seized had the same purity as the portion that was seized. We disagree. Expert testimony offered by a government witness tended to prove that the purity of methamphetamine produced in a lab is usually between 85 percent and 95 percent. Given the fact that 88 percent is within this normal range of purity, and that the remainder of the methamphetamine was produced in the same lab by the same "cooks" who produced the portion determined to have a purity of 88 percent, the assumption that the purity would be consistent is manifestly reasonable. Mr. Mosby is therefore punishable for 498.96 grams of actual methamphetamine if it was foreseeable to him that this amount would be involved in the conspiracy.

The testimony of other witnesses tended in fact to show that Mr. Mosby provided necessary materials to the Warsaw lab for the purpose of "cooking" methamphetamine, and it was certainly foreseeable that his co-conspirators would do as planned and produce the amount of drugs attributed to

him. Mr. Mosby is therefore accountable for that amount, and the trial court thus did not err in calculating his sentence.

VI.

For the reasons stated, we affirm the judgment of the trial court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRUIT